IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1340

ALESSANDRO S. CRISAFULLI
JULIA BYUS
FRANCIS J. BURKE
WILLIAM R. BONNER
CURTIS B. DALL

Each of the above, on behalf of him or herself and of all others similarly situated.

*Appellants,*

v.

THE SECRETARY OF THE TREASURY
(ex The Honorable William E. Simon);
THE UNITED STATES OF AMERICA,

*Appellees.*

AN APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

## Jurisdictional Statement and Appellant's Petition for the Continuance of This Case until After *Pressler v. Blumenthal*, Case No. 76-1005, Shall Have Been Decided by This Honorable Court.

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## OPINION BELOW

The Opinion of the District Court is Reproduced in Appendix A, *infra*.

## JURISDICTION

On March 22, 1976, appellants brought this action in the United States District Court for the District of Columbia to enjoin the President, then The Honorable Gerald R. Ford, from implementing automatic cost-of-living pay raises for the Vice President and the Members of Congress pursuant to Sections 203 and 204(a) of the Executive Salary Cost-of-Living Adjustment Act of 1975, 2 U.S.C. 31, P.L. 94-82. The Secretary of the Treasury, then The Honorable William E. Simon, was joined as a party defendant. Due to intervention by the United States Attorney, the United States Marshal did not make service upon the President. Appellants thereupon joined the United States as a party defendant and mail service was affected upon the President as provided for in the Federal Rules of Civil Procedure. Appellants demanded trial by a jury, by a blue ribbon panel, or by a special master, of all non-stipulated factual questions. A three-judge district court was convened pursuant to 28 U.S.C. Sections 2282 and 2284. On October 19, 1976, the three-judge district court decided pertinent factual questions and filed an opinion and order granting summary judgment to appellees and dismissing appellants' complaint, Appendix A, *infra*. On November 22, 1976, the Court denied without opinion appellants Motion to Reconsider. Appendix A, *infra*. On December 1, 1976, appellants



filed a timely Notice of Appeal. Appendix B, *infra*. On February 4, 1977, Justice Brennan extended the time for docketing this appeal to March 30, 1977. The court has jurisdiction over this appeal by virtue of 28 U.S.C. Sec. 1253.

## QUESTIONS PRESENTED

(1) Whether Sections 203 and 204(a) of the Executive Salary Cost-of-Living Adjustment Act of 1975, 2 U.S.C. Sec. 31, P.L. 94-82, (hereinafter called "The Act") as implemented by the President, violate the right of appellants to Due Process of Law as guaranteed by the Fifth Amendment to, and Article I, Section 8, of the United States Constitution, because gross discrimination and a less than uniform application of the "inflation tax" results for which appellants only effective remedy, their right to vote, has been impaired by unconstitutional provisions of the Act.

(2) Whether Sections 203 and 204(a) of the Act violate Article I, Section 9, Clause 7 of the United States Constitution and Title 31, Section 665 of the U.S. Code, because it authorizes money to be drawn from the Treasury otherwise than in consequence of appropriations made by law.

(3) Whether Sections 203 and 204(a) of the Act, in the manner of its implementation, violates the Due Process Clause of the Fifth Amendment to, and Article I, Section 7, Clause 2 of the United States Constitution in that it denies Appellants essential information they need as citizens to cast an intelligent vote for their respective Congressmen, and hence, impermissibly impairs appellants right to vote.

(4) Whether Sections 203 and 204(a) of the Act violate Article I, Section 1 of the Constitution in that it constitutes an impermissible and unconstitutional delegation of legislative power to the President.

(5) Whether the Court below erred in permitting the United States Attorney to take Service of Process to be made upon the President of the United States from the hands of the United States Marshal, where such service would be both legal and necessary pursuant to the "Superior Government Officer Doctrine," as embodied in P.L. 87-748, 76 Stat. 744.

(6) Whether the United States District Court, sitting as a three-judge-court, erred when it reached and decided questions of fact that should have been decided by a jury or special master pursuant to the Seventh Amendment and Rule 38, F.R.C.P.

(7) Whether the United States District Court, sitting as a three-judge district court, erred when it reached and decided questions of fact that it was incompetent to decide by reason of the provisions of Public Law 93-512(a).

(8) Whether the pattern of opposition by appellee was so vexatious as to warrant the award of attorneys fees and costs to appellants.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

(1) Sections 203 and 204(a) of the Executive Salary Cost-of-Living Adjustment Act of 1975, P.L. 94-82 Stat. 421, 2 U.S.C. 31 provide:

*Sec. 203.* Section 104 of Title 3, United States Code, relating to the rate of salary of the Vice



President, is amended by striking out "$62,500, to be paid monthly," and inserting in lieu thereof "the rate determined for such position under Chapter 11 of Title 2, as adjusted under this section. Effective at the beginning of the first month in which an adjustment takes effect under Section 5303 of Title 5 in the rates of pay under the General Schedule, the salary of the Vice President shall be adjusted by an amount, rounded to the nearest multiple of $100 (or if midway between multiples of $100, to the nearest higher multiple of $100), equal to the percentage of such per annum rate which corresponds to the overall average percentage (as set forth in the report transmitted to the Congress under section 5305 of Title 5) of the adjustment in such rates of pay. Such salary shall be paid on a monthly basis."

*Sec. 204(a). Section 601(a)* of the Legislative Reorganization Act of 1946 (2 U.S.C. 31) is amended to read as follows:

"Sec. 601.(a)(1) The annual rate of pay for–

"(A) each Senator, Member of the House of Representatives, and Delegate to the House of Representatives, and the Resident Commissioner from Puerto Rico,

"(B) the President pro tempore of the Senate, the majority leader and the minority leader of the Senate, and the majority leader and the minority leader of the House of Representatives, and

"(C) the Speaker of the House of Representatives, shall be the rate determined for such positions under section 225 of the Federal Salary Act of 1967 (2 U.S.C. 351-361), as adjusted by paragraph (2) of this subsection.

"(2) Effective at the beginning of the first applicable pay period commencing on or after the

first day of the month in which an adjustment takes effect under section 5305 of Title 5, United States Code, in the rates of pay under the General Schedule, each annual rate referred to in paragraph (1) shall be adjusted by an amount, rounded to the nearest multiple of $100 (or if midway between multiples of $100, to the next higher multiple of $100), equal to the percentage of such annual rate which corresponds to the overall average percentage (as set forth in the report transmitted to the Congress under such section 5305) of the adjustment in the rates of pay under the General Schedule."

(2) The Due Process Clause of the Fifth Amendment to the United States Constitution in pertinent part reads as follows:

> No person shall be . . . deprived of life, liberty, or property, without due process of law;

(3) Article I, Section 9, Clause 7 of the United States Constitution in pertinent part reads:

> No money shall be drawn from the Treasury but in consequence of appropriations made by law;

(4) Title 31, Section 665(a) of the United States Code reads as follows: (Emphasis added).

> Sec. 665. Appropriations-Expenditures or Contract Obligations in excess of funds prohibited.
>
> (a) *No Officer or employee of the United States shall make or authorize an expenditure from or create or authorize an obligation* under any appropriation or fund in excess of the amount available therein; nor shall any such officer or employee involve the Government in any contract or other obligation, *for the payment of money for any purpose, in advance of appropriations made for such purpose, unless such contract or obligation is authorized by law.* (Emphasis added.)



(5) Article I, Section 7, Clause 2 of the United States Constitution reads in pertinent part as follows:

> . . . the votes of both Houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each House respectively.

(6) Article I, Section 1 of the Constitution reads:

> All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

(7) The Seventh Amendment to the United States Constitution reads as follows:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law.

(8) Rule 38(c) of the Federal Rules of Civil Procedure in pertinent part read as follows:

> (a) The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.
>
> (b) Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing.

(9) The pertinent provisions of Public Law 93-512, 28 U.S.C. 455 are as follows:

> (a) Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) For the purposes of this section the words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(c) . . . Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

## STATEMENT OF THE CASE

On March 22, 1976, appellants brought this action in the United States District Court for the District of Columbia. Appellants sought a declaratory judgment, that Sections 203 and 204(a) of the 1975 Cost-of-Living Adjustment Act were unconstitutional insofar as they authorized cost-of-living adjustments to the salary rates of members of the legislative branch without requiring a direct vote by the Congress. Plaintiffs (appellants here) brought suit pursuant to 42 U.S.C. Sec. 1983 to redress deprivations of Constitutional rights, as well as pursuant to 28 U.S.C. 1343 and 1346 and other applicable provisions of the United States Code. Plaintiffs asserted that in practice and operation the challenged statute resulted in gross tax discrimination without due process of law. As an example, plaintiff Alessandro Crisafulli is a retired college teacher whose life work was teaching in private schools and colleges. Being in non-covered employment, Crisafulli's sole retirement income consists of a pension of $143.46 a month provided by the Teachers Insurance Annuity Association, a group pension plan covering most of the teachers in private schools and colleges. Resting on the concept of a stable dollar, the pensions provided by the Teachers Annuity plan are based on actuarial principles and on the sums contributed to the plan during a



pensioner's working life. Since his retirement, inflation has severely reduced Crisafulli's "Real" retirement income and that of other retired teachers to a very substantial degree. This reduction in income, relative to the income of Congressmen, results in part, because Mr. Crisafulli's pension is not periodically adjusted automatically by law to protect him against an inflation caused by the deficit spending policy of Congress. The other plaintiffs, like Crisafulli, alleged similar relative income deterioration as a result of the Congressionally imposed "inflation tax." As a result of the discriminatory tax, plaintiffs asserted standing, pursuant to the Fifth Amendment to the Constitution, to challenge the Constitutionality of Public Law 94-82.

In part, plaintiffs argued, that taxes, including taxes disguised as inflation, add to the cost of products that are so taxed. Therefore, an "automatic" cost-of-living pay increase tends to insulate the beneficiaries of automatic cost-of-living pay increases from equitably sharing in the increased tax costs of deficit spending. An inordinate share of the inflation tax burden therefore falls upon citizens who lack the power to provide themselves with automatic cost-of-living pay increases. Consequently, little if any consideration need be given by an insulated Congress to the impact that automatic cost-of-living pay increases bear upon the federal budget or upon the inflation spiral that adds to the cost-of-living of the 85% of the citizenry whose incomes are not automatically adjusted by law to compensate for increases in the cost-of-living. This, plaintiffs alleged, in turn leads to irresponsible tax and spending practices by the Congress and denies to persons such as plaintiffs the effective equal protection of the laws. The especially unconstitutional feature of

the challenged statute, plaintiffs asserted, is the provision authorizing the President to increase the cost-of-living pay of Congressmen without a vote by Congress.

Plaintiffs alleged that the President's determination of the recommended pay scales for Congressmen flows from a statutory procedure that places in the hands of Government Employees and Government-Employee oriented organizations, who will personally benefit in the same degree, the responsibility for making recommendations to the President for cost-of-living increases in the compensation of members of Congress.

Furthermore, plaintiffs alleged, the President's implementation of the recommended cost-of-living adjustments for Congressmen has the effect of an amendment of existing law pertaining to Congressional compensation; an amendment that takes effect without a vote by the Congress; in effect, an amendment by the executive branch that may be implemented by the President before Congress votes a supplemental appropriation of funds; and, which clearly denies to the voters of the United States a fundamental and essential right of a democratic form of government, the right granted under the Constitution to see how their representatives vote on an important spending Bill; a spending Bill that benefits those very representatives.

Public Law 94-82, plaintiffs submitted, is glaringly inconsistent with the spirit of the United States Constitution; it is destructive of sound and fiscally responsible legislation; it reverses our Constitutional course after two hundred years and abets taxation without representation. The result, they alleged, is to encourage taxation that is not only highly regressive, but a tax that is invidiously discriminatory against plaintiffs.



Plaintiffs emphasized that they did not ask the District Court to declare inflation unconstitutional, nor did they ask the court to declare deficit spending illegal. Plaintiffs did not challenge the right of Congress to provide itself with cost-of-living pay raises. Plaintiffs did not ask the court to compel Congress to pass a law giving plaintiffs and others living on fixed incomes a cost-of-living pay increase. Only one thing was challenged, the constitutionality of Congress delegating to the President a legislative power compelling the President to submit to Congress, in perpetuity, an inflation-indexed pay increase for members of Congress that would automatically go into effect within 30 days without a vote by Congress.

After plaintiffs action was brought, defendants contended that inflation was not a tax. It is submitted that defendant's contention was refuted. Despite the foregoing, the three-judge district court ruled that plaintiffs could not "characterize" their action as one under the due process clause "despite the lack of undifferentiated injury." The court then denied plaintiffs the standing to sue. Plaintiffs then moved the court to reconsider whether or not its ruling that plaintiffs suffered an "undifferentiated injury" was reached only because the court did not allow the economic facts that would substantiate such an injury to be argued before a qualified special master. The court denied plaintiffs (appellants) Motion to Reconsider without issuing an opinion. Appellants filed a timely notice of Appeal on December 1, 1976. On February 4, 1977, Justice Brennan extended the time for submitting an appeal to March 30, 1977.

## THE QUESTIONS PRESENTED ARE SUBSTANTIAL

A. Pursuant to the Due Process Clause of The Fifth Amendment and 28 U.S.C. 1983 Appellants have standing to sue to protect a constitutional right to due process of law. The idea that a right may exist that cannot be protected by the law courts is fanciful. Justice Holmes dismissed the idea with the comment:

> Legal obligations that exist but cannot be enforced are ghosts that are seen in the law but that are elusive to the grasp.[1]

In another case a distinguished English jurist held that an equity court, "will not permit an unconscionable use to be made of a legal power."[2] Chafee has said that "it is the function of courts to product justice, and they should feel free to use for that object all or any of the means which long custom and legislation have placed at their disposal."[3]

Appellants have been denied by a federal court the right to sue to redress an inalienable right, the right to see how their individual representatives vote on an important spending measure; a measure that benefits their representatives at both a political and economic cost to the appellants. The due process clause grants standing to citizens to enjoin the impairment of their right to vote.

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[1] *The Western Maid*, 257 U.S. 419, 433 sub nom.

[2] Turner, L. J. in *Micklethwaite v. Micklethwaite*, 1 Re G. 5J. 504, 524 (1857).

[3] Chafee, "Does Equity Follow the Law of Torts?" 75 Pa. L. Rev. 1.



Speaking of the Fifth Amendment this court has held:

> This amendment contains no equal protection clause, but it does forbid discrimination that is so unjustifiable as to be a violation of due process.[4]

In another case this court held:

> If a classification would be invalid under the equal protection clause of Amendment 14, it is also inconsistent with this clause.[5]

When Congress delegated to the President the legislative power to adjust automatically Congressional compensation so as to tie it to an inflation index, and to obligate and expend funds to keep Congressional pay current with the rising cost-of-living, it removed a right from the voters that is guaranteed by the Constitution, namely the right to make legislators accountable to the voters for a legislator's specific spending actions. Plaintiffs have asserted a claim seeking to vindicate constitutional rights pursuant to 28 U.S.C. 1343 and other statutes.

The District Court below in its order granting plaintiffs' application for a Three Judge Court held that plaintiffs raised "non-frivolous constitutional issues" falling within "the broad rubric of due process of law."

Appellants contend that the three-judge district court's later ruling, finding the law (and facts) contrary to the ruling of the one-judge court, was a finding unsupported by and contrary to the evidence, and it

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[4] *Shapiro v. Thompson*, 89 Sup. Ct. 1322, 394 U.S. 618.

[5] *Johnson v. Robinson*, Mass. 1974, 94 S. Ct. 1160, 415 U.S. 361.

was in defiance of the waiver demanded by P.L. 93-412.

B. Article I, Section 8, of the United States Constitution requires the federal courts to be available to hear citizen complaints resting upon an allegation that a tax is not uniform in its incidence.

C. Article I, Section 9, Clause 7 of the United States Constitution and Title 31, Section 665 of the United States Code prohibit funds from being drawn from the Treasury otherwise than in consequence of appropriations made by law.

It is clear that in a democratic society no power to obligate public funds can be delegated in perpetuity. Yet P.L. 94-82 purports to delegate such a power to the President.

D. Article I, Section 7, Clause 2 of the United States Constitution was inserted to provide citizens with essential information they need as voters.

The framers of the Constitution relized that if Congress could delegate to the executive branch the sole responsibility for important spending measures, the electorate would eventually be unable to demand an accounting for Government Policies from those it elected to Congress.

Appellants submit that the challenged legislation affects their right to exercise an effective vote because it hinders their ability to determine their individual Congressman's genuine position on an important tax and spending measure.

For a court to deny standing under such circumstances is to shield an unconscionable misuse of federal power.

E. Article I, Section 1 of the Constitution prohibits a delegation of legislative *spending power* to the President. (Emphasis added).



Appellants submit that "automatic" cost-of-living pay raises for Congressmen, the very body of men charged under the Constitution with the control of the money supply and of the national debt, inevitably must lead to, and encourage, "uncontrollable"[6] tax and spending increases. Appellants contend that it is only the "automatic" feature, the shunning of budget control and accountability by Congress, that is fiscally irresponsible, not the fact of, or the amount of, any Congressional cost-of-living pay raise as such.

Appellants are aware that they would have no standing pursuant to the *Flast* decision[7] solely to complain if Congress sought to shield itself from the inflationary consequences of deficit spending. They assert standing only to complain about the unconstitutional way Congress has gone about it. It is clear that *the statute leads to fiscal irresponsibility, which in turn causes an invidiously discriminatory tax to fall on appellants. The Statute effectively denies appellants both economic and political rights.* They submit this constitutes a grievance duly worthy of this court's concern.

Appellants have clearly established a logical nexus between their status as taxpayers and citizens and the precise nature of the constitutional infringement alleged. Appellants have shown that the inflation tax (viz. the deficit spending tax) does not have a uniform incidence upon all taxpayers because it falls more heavily on persons with fixed incomes than it does on

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[6] Senator Muskie, Chairman of the Senate Budget Committee, has frequently voiced complaint over the part of the budget which escapes Congressional scrutiny and control.

[7] *Flast v. Cohen*, 392 U.S. 83 (1968).

persons whose incomes are automatically adjusted by law for changes in the cost-of-living. Accordingly, appellants as persons aggrieved and adversely affected, are entitled to standing. They rely on the Fifth Amendment and the statutes supportive of citizens standing to bring suit pursuant to that Amendment. A fair reading of their complaint demonstrates that they did not go before the United States District Court to air generalized grievances about the conduct of government or of the allocation of power in the federal system. The issue of the proper allocation of federal power, pursuant to Article I, Section 1, certainly arose. But, it materialized in a subsidiary or supportive context. It is because of the potential for irreparable harm that the challenged statute bears to appellants that they have standing to challenge the statutes offensiveness to Article I, Section 1.

Even if a constitutional violation is not ultimately found, this case presents "compelling circumstances"[8] for a federal court to exercise its equitable discretion and consider the alleged constitutional violation on the merits, and on the evidence. In P.L. 94-82 Congress has endeavored to render itself, in a very real sense, unaccountable to the electorate for the result of one of its most politically important spending measures. The Congressional action is politically understandable. But the question is, is it constitutionally permissible?" Voters living on fixed incomes such as appellants, since the passage of P.L. 94-82, now find it difficult to raise before Congress the issue of deficit spending's impact

[8] *Colegrove v. Green*, 328 U.S. at 565 (Mr. Justice Rutledge concurring).



on their own cost-of-living tax burden. The only place in the legislative process where Congress formerly was compelled to pay some heed to such citizens was when it voted on its pay. The right to seek effective redress for burdensome and confiscatory[9] taxation is a fundamental right of a free people. King George III had to learn that truth the hard way. *Is Congress to be permitted to so effectively isolate itself from the voters that it need no longer heed the lessons of its own history?*

F. The doctrine of "Superior Government Officer" permits and should compel service upon the President in order to enjoin the implementation of P.L. 94-82, because the President alone has the power to implement the pay raise without a vote by Congress.

G. The District Court erred when it decided that plaintiffs suffered an "undifferentiated injury". Such a finding was a finding of fact for a master to decide on the basis of evidence.

Plaintiffs (appellants here) in the amendment of their Complaint pursuant to Rule 15(a), filed 4 May, 1976, made demand as follows:

> Plaintiffs, pursuant to Rule 38(c) and the Seventh Amendment of the United States Constitution, demand trial by jury (or by a blue ribbon panel of special masters) of all questions of fact to which the parties may not stipulate, or that may be inappropriate for judicial determination.

In their pleadings, plaintiffs (among other matters) alleged that an "automatic cost-of-living pay increase

[9] The dangers of accelerating and even run-away inflation in the United States are very real. Such inflation, history shows, is confiscatory.

tends largely to insulate those politically powerful enough to be the beneficiaries of cost-of-living pay increases from sharing equitably in the increased tax and inflation costs of deficit spending." Plaintiffs there, and in other places, raised factual questions. The defendant, too, raised questions of a factual kind, the resolution of which was essential to a determination of the validity of the Fifth Amendment basis of their complaint which was to allege an impairment of their voting rights. Plaintiffs' allegations were not refuted by defendant. In fact the record will show that plaintiffs offered statements by defendant Simon, for example, conceding that inflation is a tax, in fact, the worst tax of all because it falls hardest on those with fixed incomes. No attempt was made by the court below to reach and to resolve, or to produce stipulations, or to hear argument on the legal issues or on the questions of fact raised. The resolution of factual questions is a prerequisite to a legal conclusion supposedly resting thereon.[10]

The District Court rested its finding that plaintiffs suffered an undifferentiated injury on the unsubstantiated statement that "inflation adversely affects all citizens." Appellants concede that inflation does adversely affect most citizens. Nevertheless, the question not decided by the Court below is the degree of adverseness of the deficit spending affect. If the

[10]Rule 38(a) Fed. Rules Civ. Procedure. Where in a single case there are factual issues common to both legal and equitable claims, either party has a constitutional right to a jury trial on the legal issue, and to have that issue resolved by a jury before the court determines the equitable issue. *Natl. Life Ins. v. Silverman*, 14 FR Serv. 2d 1416 (App. D.C. 1971).



evidence would show an invidiously greater adverse affect upon appellants than upon Congressmen, for example, that finding might lead the court to a contrary finding. Plaintiffs offered to present evidence and witnesses at a trial, including testimony by "a recent international prize winning economist" who would give evidence in favor ot plaintiffs on the question of "undifferentiated injury."[11] Plaintiffs offer was spurned.

H. The United States District Court, sitting as a three-judge-court erred when it reached and decided issues that it was incompetent to decide without a waiver pursuant to the provisions of Public Law 93-512(a).

Appellants declared a willingness to grant a waiver to a three-judge District Court to decide all of the legal and equitable issues presented by their complaint, but they deliberately withheld the waiver required by P.L. 93-512(a) until the factual questions could be disposed of in a fair and impartial proceeding. Appellants deliberately had demanded jury trial of unresolved factual questions for two reasons. First, the questions of fact pertaining to the discriminatory application of the deficit spending tax, unless stipulated to, required considerable expertise in the science of economics and statistics for a sound and unbiased resolution, an expertise generally beyond the competence of most judges. Second, the issue pertaining to the automatic cost-of-living pay raise for Congressmen was such, plaintiffs feared, that a ceiling on judicial pay might be affected by any decision limiting automatic pay raises

[11]In their Motion to Reconsider.

for Congressmen. Hence, plaintiffs had grounds to suspect a subtle bias on the part of members of the federal judiciary for a ruling in favor of leaving P.L. 94-82 alone. Clearly there was a solid basis for plaintiffs to refuse to allow the court to decide the factual questions involved.

### I. Appellants are Entitled to Costs and Attorneys Fees.

Even in the absence of statutory right, it has long been the policy of the courts to award attorney's fees where the conduct of the defendant was such as to amount to obdurate obstinacy, or where an award of attorney's fees may be warranted where the plaintiff's litigation produces significant common benefits, pecuniary or otherwise. Here an award is especially warranted because suit was filed pursuant to the broad grant of equitable jurisdiction in the federal courts under 42 U.S.C. 1983 to "redress deprivations of Constitutional rights."

## REASONS FOR GRANTING APPELLANTS' PETITION TO CONTINUE THIS CASE UNTIL AFTER *PRESSLER V. BLUMENTHAL*, CASE NO. 76-1005, IS DECIDED.

The Honorable Larry Pressler, a member of Congress, has appealed a decision to this court (Case No. 76-1005) from the three-judge district court that decided appellants' case. The objectives of both this appeal and the Pressler appeal are the same, i.e., to enjoin prospective "automatic" pay raises for federal



legislators. Congressman Pressler seeks to halt all the automatic features of any prospective Congressional pay raises. Appellants, because of the standing hurdle, offer no objection to, and make no opposition to, the comparability pay raises provided for by the provisions of the Postal Revenue and Salary Act of 1967. They contest only the automatic legislative cost-of-living pay raises provided for by the Cost-of-Living Adjustment Act of 1975.

In the event that the appeal by Congressman Pressler should not succeed in enjoining automatic, prospective cost-of-living pay raises for federal legislators, because it rests entirely upon the provisions of Article I, Section 1 and 6 of the Constitution, appellants submit that the additional constitutional questions presented by their own appeal, issues relating to citizens' rights to due process, the right to a jury trial, and of rights under other Articles and Sections of the Constitution, would warrant further and additional consideration by this honorable court.

However, if Congressman Pressler should prevail, there will be no requirement for this Court to hear argument on any of the numerous other questions raised in appellants appeal, except possibly at some time, appellant's right to recover attorneys fees and costs.

Appellants are persons of very limited financial resources. They have largely exhausted the funds they had available for this fight in the court below. An additional effort on their part now depends upon outside help and the services of a volunteer attorney. Help has been promised them, but not quite enough for a major effort at this stage of the proceedings. Accordingly, appellants have applied to all of the

parties in Case No. 76-1005 for permission to file a brief as *amicus curiae* in that case. It is anticipated that permission will be granted. This will enable appellants to obtain an attorney to participate, and to present argument before this court at a cost they may reasonably hope to finance.

The court, in turn, in its own discretion, may ask any of the parties to submit argument on additional constitutional questions if it should believe such may be of help to it in reaching an early decision.

## CONCLUSION

For all of the reasons stated above, appellants submit that the questions presented in this appeal are substantial and that the court should note probable jurisdiction. However, submission of briefs and oral argument in this appeal should be deferred until after Case No. 76-1005, *Pressler v. Blumenthal*, is disposed of by this court, as the relief sought by appellants may be fully satisfied by this court's decision in Case No. 76-1005.

Respectfully submitted,

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## APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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**Civil Action No. 76-471**

---

ALESSANDRO S. CRISAFULLI, *et al.*,
*Plaintiffs,*

v.

HONORABLE WILLIAM E. SIMON,
Secretary of the Treasury,
*Defendant.*

## ORDER

This matter comes before the court on defendant's motion to dismiss. Plaintiffs in this action seek to challenge the provisions of the Executive Salary Cost of Living Adjustment Act of 1975, Pub. L. No. 94-82, 89 Stat. 421, 2 U.S.C. §§31, 356. Plaintiffs basically make three claims: that the Act violates article 1, section 8 of the Constitution and the sixteenth amendment by exempting members of Congress from an "inflation tax," thus making the application of that tax less than uniform; that the Act causes money to be drawn from the Treasury other than by appropriation, thereby violating article 1, section 9, clause 7 of the Constitution; and that the Act constitutes an impermissible

delegation of legislative authority in violation of article 1, section 1 of the Constitution.

Plaintiffs' standing to pursue the present action has been brought into issue by the motion to dismiss. Standing of course is a threshold question in every federal case relating to the power of the court to entertain the suit. *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975). Plaintiffs in the present case suggest several bases supporting their standing to pursue this action. They claim standing as citizens, taxpayers, under the due process clause of the fifth amendment, under 28 U.S.C. §1343, under any other constitutional provision or statute securing "constitutional rights," and under article three's grant of equity jurisdiction to federal courts.

The court can quickly dispose of a number of these claimed bases. The grant of equity jurisdiction to federal courts of course does not abrogate the case or controversy requirement of article 3 that forms the constitutional basis of the standing requirement. Section 1343 of title 28 U.S. Code, which confers jurisdiction on federal courts to redress violation of constitutional rights occurring under color of state law, in no way confers standing on plaintiffs since it is a jurisdictional statute only. Nor may plaintiffs support their standing claim merely by characterizing their action as one under the due process clause of the fifth amendment. Under this theory any citizen could attack any legislative enactment of Congress merely by alleging a due process violation, despite the lack of undifferentiated injury. Plaintiffs suggest that they, being of fixed income, are most hurt by the inflation allegedly caused by the challenged statute, but inflation adversely affects all citizens. Other general references to unspecified constitutional and statutory provisions give no support to standing.



Thus plaintiffs' claim to standing is reduced to the assertion of standing as citizens and taxpayers. This contention too must fail. *Richardson v. Kennedy*, 313 F. Supp. 1282 (W.D. Pa. 1970), *aff'd mem.* 401 U.S. 901 (1971); *see Pressler v. Simon*, Civ. No. 76-0782 (D.D.C. Oct. 12, 1976).

The plaintiffs thus having failed to show standing to challenge the statute at issue, this court must dismiss the suit.

Accordingly, it is, by this court, this 18th day of October, 1976,

ORDERED that defendant's motion to dismiss be, and the same hereby is, granted; and it is further

ORDERED that this action be, and the same hereby is, dismissed with prejudice.

Edward Allen Tamm
UNITED STATES CIRCUIT JUDGE

Gerhard A. Gesell
UNITED STATES DISTRICT JUDGE

Thomas A. Flannery
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

---

**Civil Action No. 76-471**

---

ALESSANDROS S. CRISAFULLI, *et al.*,
*Plaintiffs,*

v.

HONORABLE WILLIAM E. SIMON,
*Defendant.*

**ORDER**

This matter comes before the court on plaintiffs' motion to reconsider the court's order of October 19, 1976. Upon consideration of plaintiffs' motion, the defendant's opposition thereto and the plaintiffs' reply, it is, by this court, this 22nd day of November, 1976,

ORDERED that plaintiffs' motion to reconsider be, and the same hereby is, denied.

UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT JUDGE



**APPENDIX B**

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

---

**Civil Action No. 76-471**

---

ALESSANDRO S. CRISAFULLI, *et al.*,
*Plaintiffs,*

v.

THE HONORABLE WILLIAM E. SIMON,
THE UNITED STATES OF AMERICA,
*Defendants.*

**NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES**

I. Notice is hereby given that the plaintiffs above named hereby appeal to the Supreme Court of the United States from the final judgment of the United States District Court for the District of Columbia, sitting as a three-judge district court pursuant to 28 U.S.C. 2884, denying plaintiffs' Motion to Reconsider the court's order denying plaintiffs' Motion for Summary Judgment and dismissing the complaint entered in this action on November 22, 1976.

This appeal is taken pursuant to 28 U.S.C. Sec. 1253.

II. The clerk will please prepare the original papers constituting the record in this cause for transmission to the Clerk of the Supreme Court of the Supreme Court of the United States. All such original papers are necessary to effect this appeal.

III. The following questions are presented by this appeal:

(1) Whether Sections 203 and 204(a) of the Executive Salary Cost-of-Living Adjustment Act of 1975, 2 U.S.C. Sec. 31, P.L. 94-82, violate the Due Process Clause of the Fifth Amendment to, and Article I, Section 8, of the United States Constitution because it results in gross discrimination in the incidence of the "inflation tax" and therefore brings about a less than uniform application of that tax, such as should warrant consideration by both houses of Congress.

(2) Whether Sections 203 and 204(a) of the Executive Salary Cost-of-Living Adjustment Act of 1975, 2 U.S.C. Sec. 31, P.L. 94-82, violate Article I, Section 9, Clause 7 of the Constitution and Title 31, Section 665 of the U.S. Code, because it allows money to be drawn from the treasury other than "in consequence of appropriations made by law."

(3) Whether Sections 203 and 204(a) of the Executive Salary Cost-of-Living Adjustment Act of 1975, 2 U.S.C. Sec. 31, P.L. 94-82, violate Article I, Section I of the Constitution in that it constitutes an impermissible and unconstitutional delegation of legislative power and contravenes recent decisions of the Supreme Court of the United States.

(4) Whether Sections 203 and 204(a) of the Executive Salary Cost-of-Living Adjustment Act of 1975, 2 U.S.C. Sec. 31, P.L. 94-82, in its implementation



violates the Due Process Clause of the Fifth Amendment to, and Article I, Section 7, Clause 2 of the United States Constitution in that it denies to plaintiffs essential information which they require in order to cast an intelligent vote for their respective Congressmen, and hence, impermissibly impairs plaintiffs right to vote.

(5) Whether the Court erred in permitting the United States attorney to take Service of Process made upon the President of the United States from the hands of the United States Marshal, where such service was legal and necessary because the President of the United States *alone* had the authority to implement the provisions of the Executive Salary Cost-of-Living Adjustment Act of 1975.

(6) Whether the United States District Court, sitting as a three-judge court, erred when it reached and decided questions of fact that should have been decided by a jury or special master as demanded by plaintiffs.

(7) Whether the United States District Court, sitting as a three-judge court, erred when it reached and decided questions of fact that it was incompetent to decide by reason of the provisions of federal law, ethical standards and fair procedure.

(8) Whether the pattern of opposition by defendant in this case was so obdurately obstinate and unmerited as to warrant the award of attorneys fees and costs to plaintiffs.

Respectfully submitted,

/s/ Grant R. Sykes
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1800 Old Meadow Road
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*Attorney for Plaintiffs*

**Proof of Service**

I, Grant R. Sykes, hereby certify that I did this 1st day of December 1976, mail by prepaid postage a copy of the foregoing Notice of Appeal to the Supreme Court of the United States to Nathan M. Morton, Esq., U.S. Department of Justice, Civil Division, Washington, D.C. 20530.

/s/ Grant R. Sykes
GRANT R. SYKES

No. 76-1340



# In the Supreme Court of the United States

OCTOBER TERM, 1976

---

WILLIAM R. BONNER, ET AL., APPELLANTS

*v.*

W. MICHAEL BLUMENTHAL, SECRETARY OF THE TREASURY, ET AL.

---

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA*

---

## MOTION OF THE SECRETARY OF THE TREASURY TO DISMISS

---

WADE H. MCCREE, JR.,
*Solicitor General,*
*Department of Justice,*
*Washington, D.C. 20530.*

# In the Supreme Court of the United States

OCTOBER TERM, 1976

---

No. 76-1340

WILLIAM R. BONNER, ET AL., APPELLANTS

*v.*

W. MICHAEL BLUMENTHAL, SECRETARY OF THE TREASURY, ET AL.

---

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA*

---

## MOTION OF THE SECRETARY OF THE TREASURY TO DISMISS

---

Pursuant to Rule 16(1)(a) of the Rules of this Court, the Solicitor General, on behalf of the Secretary of the Treasury and the United States, moves to dismiss this appeal from the judgment of the district court.

Appellants, retired or self-employed individuals, brought this action challenging the constitutionality of procedures under the Executive Salary Cost-of-Living Adjustment Act, Pub. L. 94-82, 89 Stat. 419, for increasing congressional salaries to reflect increases in the cost of living. In particular, appellants challenge Section 204(a) of the Act, 89 Stat. 421, 2 U.S.C. (Supp. V) 31, which provides for automatic periodic adjustments of the compensation paid to Members of Congress, to reflect the adjustments in pay that are made for federal employees classified under the General Schedule

pay system (see 5 U.S.C. (and Supp. V) 5305)[1] (J.S. 8). Appellants seek to enjoin any increased payment to Members of Congress other than that actually voted on by Members of Congress, including any increase implemented under Section 204(a).

A three-judge district court, convened pursuant to 28 U.S.C. 2282 (J.S. 2),[2] dismissed this action solely on the ground that appellants lack standing (J.S. App. 1a-3a).[3] Appellants have appealed to this Court pursuant to 28 U.S.C. 1253 (J.S. 3; J.S. App. 1b-3b). A decision of a three-judge district court dismissing an action for lack of standing, however, is reviewable in the first instance by the court of appeals, not this Court. *Gonzalez* v. *Employees Credit Union*, 419 U.S. 90; *Dickson* v. *Ford*, 419 U.S. 1085; *MTM, Inc.* v. *Baxley*, 420 U.S. 799.

Since the complaint in the present case was dismissed solely on the ground that appellants lack standing, this

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[1]A more detailed discussion of the Adjustment Act is set forth in our motion to affirm in *Pressler* v. *Blumenthal*, No. 76-1005, vacated and remanded May 16, 1977. A copy of that motion is being furnished to the appellants.

[2]On August 12, 1976, while this action was pending in the district court, 28 U.S.C. 2282 was repealed by Section 2 of Pub. L. 94-381, 90 Stat. 1119. That repeal does not, however, apply to any action commenced on or before the date of enactment of Pub. L. 94-381 (see Section 7, 90 Stat. 1120).

[3]Appellants in their Jurisdictional Statement also challenge Section 203 of the Executive Salary Cost-of-Living Adjustment Act, 89 Stat. 420, 3 U.S.C. (Supp. V) 104, a comparable provision relating to cost-of-living adjustments to the Vice President's salary. This statute was not, however, referred to in appellant's complaint, nor addressed by the district court. The district court's holding that appellants lack standing would, in any event, appear to apply equally to appellants' challenge to Section 203.



Court does not have jurisdiction to consider this appeal, and should dismiss it.

Respectfully submitted.

WADE H. MCCREE, JR.,
*Solicitor General.*

JUNE 1977.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976

**76-1340**

WILLIAM R. BONNER, *et al.*,

*Appellants,*

v.

W. MICHAEL BLUMENTHAL, Secretary of the Treasury, *et al.*,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

## APPELLANTS' REPLY TO THE MOTION OF THE SECRETARY OF THE TREASURY TO DISMISS

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976

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WILLIAM R. BONNER, *et al.*,

*Appellants,*

v.

W. MICHAEL BLUMENTHAL, Secretary of the Treasury, *et al.*,

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

---

## APPELLANTS' REPLY TO THE MOTION OF THE SECRETARY OF THE TREASURY TO DISMISS

---

Come now William R. Bonner, *pro se*, on behalf of all the appellants and in reply to the motion of the Secretary of the Treasury to dismiss, states as follows:

1) The motion to dismiss does not respond to appellants' motion for a continuance of this case.

2) As pointed out in appellants' brief in support of the motion for a continuance,[1] this case and the

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[1] Appellants' Br. 20-22

*Pressler* case raise similar constitutional questions. In the event of a decision favorable to appellant Pressler, the issues raised by this case will be fully satisfied and further proceedings will not be necessary.

3) Appellants are persons of limited means. It would be an unwarranted hardship to return this case to the court below for additional proceedings that would not immediately further the objective of these appellants.

4) The Secretary's motion to dismiss entirely misconstrues the nature of the issues raised by the appellant. Appellants do not appeal in this court a decision by the district court to deny standing to sue. Appellants, on the contrary, appeal the district court's denial of appellants' motion to reconsider, which raised due process issues which previously have not been considered by this court on appeal from three-judge courts; e.g., whether the district court's decision to decide factual questions was inadvertent, void, and of no effect whatever in view of the provision of Public Law 93-512(a), the seventh amendment of the U.S. Constitution, and Rule 38(a) of the federal rules of civil procedure.[2]

5) Appellants clearly won standing to sue in the district court by raising "no frivolous constitutional issues falling within the broad rubrick of due process of law."[3] Appellants' standing in

[2] See in this connection footnote 10 of Appellants' Br. 18.

[3] Words quoted are from the finding by the district court granting appellants' motion for a three-judge vote.



the district court rests on the same basic ground as does that of appellant Pressler, e.g., that voting rights were adversely affected. A valid question is presented therefore: Is it proper to grant standing to a public official and to deny it to an ordinary citizen where the same substantive constitutional right is at issue? This question was evaded by the court below.

## CONCLUSION

The motion of appellants for continuance of this case should be granted.

Respectfully submitted,

WILLIAM R. BONNER

*pro se*